

# Contractor or employee?

## Frequently asked questions

Farmers may choose to engage an independent contractor when they have a specific job which needs to be done by a person with a particular skill, for instance, silage making or hay making.

It is important to be able to distinguish between an independent contractor and an employee as the law imposes different rights and obligations on those who engage independent contractors and those who engage employees.

### What is a contractor?

A contractor is someone who you pay for a service. They can choose to take the job, they can delegate who does the task, they are responsible for getting the job done and they supply their own equipment. They have an ABN and are responsible for their own Workcover and super.

### What is the difference between a contractor and an employee?

An independent contractor is a person who works under a written commercial contract or a written contract for services. The independent contractor can operate as an individual or through a partnership, company or trust.

An employee is defined as a person who works under an employment contract or a contract of service.

If a person working on a dairy farm has nothing else to sell other than their labour, then they will more than likely be an employee, not a contractor. Someone does not become a contractor simply by supplying an ABN.

### Can I employ a relief milker as a contractor?

It is unlikely that a relief milker would be a contractor.

### Further reading

Read about independent contractors, including a draft contract for services on dairy farm template and understanding criteria to qualify as an independent contractor vs employees - visit [thepeopleindairy.org.au/employment-rewards/independent-contractors](https://thepeopleindairy.org.au/employment-rewards/independent-contractors)

### Want to know more?

Visit [thepeopleindairy.org.au](https://thepeopleindairy.org.au) and use the search box at the top right of the screen. Type in a keyword, click Search to bring up a list of related topics.

## The Law

### Sham contracts

The federal industrial laws make it an offence to do any of the following and significant penalties apply:

- dismiss an employee for the purpose of engaging them as an independent contractor;
- represent an employment relationship as independent contracting;
- make a false statement for the purpose of influencing or persuading an individual to enter into an independent contract

### Common law

Employment is regulated by state and federal industrial relations laws including awards. An employee does not have the right to control how and when work is performed and cannot delegate work to others.

Some laws such as workers compensation and superannuation laws as well as some taxation laws deem workers to be employees regardless of the common law definition.

Because industrial laws about employment do not apply to independent contractors some people think that if they call a person a contractor they will be able to avoid these responsibilities. This is not the case.

Calling a person an independent contractor, when the true nature of their engagement is as an employee, does not avoid these laws applying.

### Contractor v. employee

The law about independent contractors has changed in 2024 and whilst it is still important that there be a comprehensive written contract which details the parties' obligations, how the contract is actually performed in practice is a key consideration.

The totality or true nature of the relationship is key to deciding if a person is in practice an employee or an independent contractor.

There are a number of questions which can be asked to help decide whether a person will be considered to be an independent contractor at common law.

- Control - how much control does the principal have over the work done by the contractor? A Contractor will be able to control how and when work is done.
- Delegation - can the contractor delegate all or some of the work or do they have to do it personally? A contractor will usually have the right to delegate the work to another person or entity.
- Can it be said that the contractor is working in their own business? A contractor will be running their own business.
- Does the contract provide for payment by fixed fee related to outcome or achievement of a satisfactory result rather than a time based pay rate? It would be unusual for a contractor to be paid by the hour for their labour alone.
- Does the contractor have invoicing systems, standard terms of trade, insurance, debt collecting systems, appropriate financial records etc. which businesses commonly use?

The following questions can also be asked to help to decide if the true nature of the relationship is one of employee and employer or contractor and principal.

- Is the person doing similar work for other people?
- Do they advertise their services to the public?
- Does the work lead to an ability to make a profit or is the work the same as an employee would do for wages?
- Was the contract price negotiated commercially?
- Does the person bear the risk for poor performance?
- Does the person use their own assets, tools and equipment to do the work?
- Does the person benefit from good will?
- Has the person agreed to provide a particular outcome or result and when the result has been achieved will they leave?

If the answers to these questions are no then it is unlikely that the person will be found to be a contractor.